

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY JOHNSON,

Case No. 08-13328

Plaintiff,

HONORABLE ARTHUR J. TARNOW
DISTRICT JUDGE

v.

WYATT HARRIS, GOVERNOR OF THE
STATE OF MICHIGAN, AND PETER
STROM,

HONORABLE PAUL J. KOMIVES
MAGISTRATE JUDGE

Defendants.

**ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION [8], DISMISSING PLAINTIFF'S
COMPLAINT [1], and DENYING PLAINTIFF'S MOTION FOR CLERK
TO SERVE SUMMONS/ COMPLAINT [5] and MOTION REQUESTING
COURT TO DIRECT CLERK OF THE COURT TO FORTHWITH ISSUE
SUMMONS/COMPLAINT TO THE U.S. MARSHAL FOR SERVICE [6]**

Before the Court is the Magistrate Judge's Report and Recommendation [8] of August 14, 2009. The Report and Recommendation recommended that Plaintiff's Complaint [1] against Wyatt Harris, the Governor of the State of Michigan, and Peter Strom be dismissed for failure to state a claim upon which relief can be granted. On August 24, 2009, Plaintiff filed an Objection [9] and on August 31, 2009, he filed a "Subsequent Objection" [10]. Defendants have not filed a response.

I. STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1), a magistrate judge's orders shall not be disturbed

unless “found to be clearly erroneous or contrary to law.” *United States v. Curtis*, 237 F.3d 598, 603. The “clearly erroneous” standard requires that the Court affirm the Magistrate's decision unless, after reviewing the entirety of the evidence, the Court “is left with the definite and firm conviction that a mistake has been committed.” *Sandles v. U.S. Marshal's Service*, 2007 WL 4374077, 1 (E.D. Mich. 2007) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948)). The test is:

not whether the finding is the best or only conclusion that can be drawn from the evidence, or whether it is the one which the reviewing court would draw. Rather the test is whether there is evidence in the record to support the lower court's finding, and whether its construction of that evidence is a reasonable one.

Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 140 (6th Cir.1985).

This Court reviews *de novo* any objections to a Magistrate's Report and Recommendation. See 28 U.S.C. § 636(b)(1).

II. PLAINTIFF'S OBJECTIONS

I. 1983 Complaint

Plaintiff objects that the magistrate declined to treat Plaintiff's § 1983 complaint as a petition for writ of habeas corpus. The magistrate determined that Plaintiff did not allege that his claims are exhausted and that Plaintiff might want to assert different claims for relief in a habeas petition. Furthermore, plaintiff has a pending petition for writ of habeas corpus in the Western District of Michigan. The magistrate's finding was not clearly erroneous or contrary to law so as require rejection of the Report and Recommendation

II. Claim against Assigned Counsel

Plaintiff also objects that he is permitted to bring a § 1983 suit against his assigned trial counsel. The magistrate's finding that a public defender does not act under color of state law when performing the traditional functions of counsel in a criminal proceeding was not clearly erroneous or contrary to law.

III. CONCLUSION

The Court has reviewed the record and the parties' pleadings in this case, and being fully advised in the premises,

IT IS ORDERED that the Report and Recommendation [8] of the Magistrate Judge is hereby **ADOPTED**, and is entered as the findings and conclusions of the Court. Plaintiff's Objection [9] and Subsequent Objection [10] are **DENIED**.

IT IS FURTHER ORDERED that Defendant's Complaint [1] is **DISMISSED**.

Finally, because the dismissal of the action moots Plaintiff's pending motions, Plaintiff's Motion for Clerk to Serve Summons/Complaint [5] and Motion Requesting Court to Direct Clerk of the Court to Forthwith Issue Summons/Complaint to the U.S. Marshal for Service [6] are **DENIED**.

SO ORDERED.

S/ARTHUR J. TARNOW
Arthur J. Tarnow
United States District Judge

Dated: September 28, 2009

I hereby certify that a copy of the foregoing document was served upon counsel of

record on September 28, 2009, by electronic and/or ordinary mail to Gregory Johnson.

S/FELICIA MOSES for THERESA E. TAYLOR
Case Manager